

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 16-320
FM Table of Allotments,	)	RM-11774
FM Broadcast Stations.	)	
(Gaylord, Michigan)	)	

To Secretary to forward to Assistant Chief, Audio Division, Media Bureau

**REPLY COMMENTS**

Darby Advertising, Inc. (“Darby”), the licensee of radio station WMJZ-FM, Channel 268C2 (101.5 MHz), Gaylord, Michigan, Ohio, Facility ID No. 11756, by its counsel, hereby submits these Reply Comments in the above-captioned proceeding. 1/

For the reasons set forth herein, both the Petition for Rulemaking (the “Petition”) filed by N Content Marketing, LLC (“N Content”) and the Joint Counterproposal (the “Henderson Counterproposal”) filed in this docket by Roy E. Henderson (“Henderson) and Great Northern Broadcasting System, Inc. (“Great Northern”) must be dismissed. Not only are the Henderson proposals set forth in the Petition and the Henderson Counterproposal procedurally defective, this attempt to manipulate Commission procedures constitutes an abuse of process that must not be tolerated by the Commission.

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1/ See Notice of Proposed Rulemaking, MB Docket No. 16-320, DA 16-1158 (Assistant Chief, Audio Div., Media Bur. rel. Oct. 7, 2016) (the “*NPRM*”) (Reply Comments due December 13, 2016).

This proceeding was initiated by N Content, an entity represented by counsel John C. Trent, Esquire, and Clifton G. Moor, Technical Consultant. N Content proposed in its August 17, 2016 Petition a single new FM allotment, Channel 246C1, at Gaylord Michigan. N Content concurrently filed a Form 301 application for a construction permit for the proposed allotment of Channel 246C1 Gaylord. *See* File No. BNPH-20160817AAQ (the “N Content 301”). The N Content 301 discloses at Section II, Item 2(a) that Roy E. Henderson is the sole Member/Manager of N Content, holding 100 percent of the voting power and 100 percent of the assets of N Content.

The *NPRM* here states that “[i]n compliance with Commission procedures, Petitioner has concurrently filed an FCC Form 301 application and paid the necessary filing fees.” *See NPRM* at ¶ 1 (footnotes omitted). However, the N Content 301 did *not* in fact comply with mandated Commission procedures in a critical respect. Specifically, the N Content 301 did not contain the certification required by the Commission in its Report and Order in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*:

A party filing a petition for rule making to add a new allotment to the Table, whether as an original proposal or as a counterproposal, must simultaneously file a Form 301 application specifying the proposed facilities. A separate Form 301 and fee must be filed for each proposed new allotment. *The application shall include a certification that, if the FM channel allotment requested is adopted, petitioner/counter-proponent intends to apply to participate in the auction of the channel allotment requested and specified in this application.* (emphasis added) 2/

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2/ *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14224 [¶ 20] (2006) (“*Allotment Streamlining Order*”).

No such certification was included in the N Content 301. On the basis of this Form 301 defect alone, the Audio Division must dismiss the Petition and terminate this proceeding.

Moreover, there is an additional basis for the termination of this proceeding, in that the Henderson Counterproposal is itself defective and constitutes an abuse of process. The Henderson Counterproposal was submitted by the same Roy E. Henderson (acting individually and as owner of Great Northern) who is the sole principal behind Petitioner N Content, employing the same counsel and the same technical consultant. It is a flagrant abuse of process for the same party to propose a new allotment, obviously with no intent to participate in auction and to construct such a station, and then to turn around in a counterproposal against that petition to propose a conflicting alternative allotment scheme.

While the Commission adopted the requirement of filing a concurrent Form 301 with a filing fee in the hopes of “discourage[ing] insincere proponents,” 3/ such an added step clearly has not discouraged Mr. Henderson’s blatantly insincere Petition proposal. 4/ Indeed, in his attempt to manipulate the Commission’s processes, Mr. Henderson had a strong motive to file an insincere Petition proposal and to purposely leave out of his Form 301 the required certification of intent to participate in auction for the new Gaylord allotment. 5/ Specifically, by filing first

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3/     *See id. at 14223* [¶ 18].

4/     Perhaps Mr. Henderson believed he could avail himself of the Commission process for a refund of the Form 301 filing fee for allotment proposals denied in favor of a counterproposal. *See id. at 14224-25* [¶ 21]. However, the Commission stated that such refunds would not be viewed favorably if the petition for a new allotment “is returned due to patent legal or engineering defects” and/or where the applicant has not acted in good faith. *See id.*

5/     Not only did Mr. Henderson omit in the N Content 301 the required certification of intent to participate in an auction for the new Gaylord allotment, but he also did not submit the required Comments in this proceeding expressing the proponent’s continuing interest in the proposed allotment. *See NPRM at Appendix Item 2.* Such a failure justifies denial of the Petition. *Accord*

[Footnote continued]

his simple Petition, and deferring his true plan for the counterproposal round, Mr. Henderson unfairly has attempted to cut off any superior counterproposals to this true plan. That is, Commission procedures permit counterproposals only if advanced in initial comments, 6/ so that there is an incentive to file in bad faith an initial, unintended proposal in order to insulate the true proposal filed at the sheltered counterproposal stage. Here, where the proponent of the Petition and the Henderson Counterproposal is one and same (being either the individual applicant or the sole controlling owner of the company/corporation 7/), the Commission cannot countenance this ploy and must dismiss both the Petition and Henderson Counterproposal and terminate this proceeding. 8/

Furthermore, there is again a fatal defect in the Henderson Form 301 applications associated with Henderson's allotment proposal. While the Henderson Form 301 applications filed for the Counterproposal drop-in channels at Au Gres, Harrisville, Shelby and Alpena,

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[Footnote continued]

*Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Kahuku and Kualapuu, Hawaii, 29 FCC Rcd 907, 910 [¶ 9] (Chief, Audio Div., Media Bur. 2014) (Petitioner's "failure to file timely its continuing expression of interest is a separate and fatal defect that warrants dismissal of the Kahuku Petition.").*

6/ See *NPRM* at Appendix Item 3(a) and 47 C.F.R. ¶ 1.420(d).

7/ The Henderson Counterproposal states that Great Northern, the licensee of WLDR-FM, "is wholly owned by Roy E. Henderson," see footnote 1, which is confirmed by the most recent ownership report on file. See File No. BOA-20131210ABU.

8/ Henderson also had a motive to defer his true plan involving the modification of five authorized stations plus four new allotments until the counterproposal stage to avoid filing through a "hybrid" application/ rule making in order to evade the four-application limit imposed by the Commission. See *Allotment Streamlining Order*, 21 FCC Rcd at 14223 [¶ 17] ("Both 'pure' application and 'hybrid' filings will be subject to the four-application limit. Both voluntary and involuntary channel changes for authorized stations will count toward the four-application limit.").

Michigan, do contain statements, the statements filed by the Comment deadline do not express the obligatory intent to participate in auctions for these new facilities. Specifically, each of these four Form 301 applications states:

IN THE EVENT THIS PROPOSED ALLOTMENT IS MADE AND MR. HENDERSON PARTICIPATES AND WINS IN THE AUCTION, HE WILL COMPLY WITH SECTION 73.3555 OF THE RULES. THIS IS PART OF A COUNTERPROPOSAL A COPY OF WHICH IS ATTACHED. 9/

These Form 301 statements do not express that Henderson “*intends to apply to participate in the auction of the channel allotment requested and specified in this application,*” as required by the Commission. 10/ Instead, they state that *in the event Henderson participates in the auction*, then he will comply with the Commission’s multiple ownership rules concerning his existing media interests (without supplying divestiture details). These flawed certifications, which cannot be corrected post-Comment date cut-off, likewise require the dismissal of the Henderson Counterproposal.

Lastly, the Commission must take cognizance of Mr. Henderson’s flaunting of the Commission’s requirement that proponents must in good faith reimburse stations their reasonable and prudent expenses for involuntary channel changes. 11/ The Henderson Counterproposal’s Technical Comments (signed by Mr. Moor, *not* Mr. Henderson) that Darby

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9/ See Exhibit 5 to FCC File Nos. BNPH-20161128AFU (Au Gres), BNPH-20161128AFW (Harrisville), BNPH-20161128AFY (Shelby), and BNPH-20161128AFV (Alpena).

10/ See *supra* note 2.

11/ See, e.g., *Circleville, Ohio*, 8 FCC 2d 159, 163 (1967) (“*Circleville*”) (requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefiting station must reimburse the affected station for its reasonable and prudent expenses).

will be reimbursed by Henderson for Darby's customary and reasonable cost to involuntarily change the channel of WMJZ-FM from Channel 268C2 to Channel 246C2 is rendered worthless by Mr. Henderson's documented conduct. The Commission cannot ignore Mr. Henderson's refusal to reimburse Victoria Radio Works, LLC, the licensee of Station KVIC(FM), Victoria, Texas, its reasonable and prudent expenses for KVIC's involuntary channel change to accommodate Mr. Henderson's upgrade of Station KHTZ(FM), Ganado, Texas. 12/ Indeed, Mr. Henderson's failure to meet his *Circleville* reimbursement pledge to KVIC led to a Letter of Inquiry issued by the Chief of the Audio Division, along with the continued pendency of KHTZ's 2013 renewal application. 13/ With this history, no Commission action taken in reliance on the good faith obligation of Mr. Henderson to fulfill the *Circleville* requirements should be undertaken.

At set forth herein, the N Content Petition, the Henderson Counterproposal, and the Form 301s associated with both, suffer from fatal filing defects and collectively constitute an abuse of Commission processes mandating their dismissal and termination of this rulemaking proceeding.


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12/ See Letter of Victoria Radio Works, LLC to Peter H. Doyle dated July 24, 2013, File No. BRH-20130328ADT.

13/ See Letter of Inquiry, Peter H. Doyle to John C. Trent, Esq. and Roy E. Henderson, dated June 18, 2014, File No. BRH-20130328ADT (KVIC claims that counsel to Henderson has not responded to its reimbursement request, has ignored follow-up telephone calls and that the reimbursement remains unpaid over a year after implementation of the involuntary channel change).

Respectfully submitted,

**DARBY ADVERTISING, INC.**

By:   
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Its Attorney

December 13, 2016

**CERTIFICATE OF SERVICE**

I, Marissa G. Repp, hereby certify that on this 13<sup>th</sup> day of December, 2016, a copy of the foregoing Reply Comments has been served by first-class mail on the following:

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